BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MICHAEL DALE BURNETT Claimant	)	
VS.	)	
TOTAL ELECTRIC CONSTRUCTION Respondent	)	Docket No. 1,019,554
AND	)	
AMERICAN INTERSTATE INSURANCE Insurance Carrier	)	

ORDER

Respondent and its insurance carrier requested review of the June 30, 2006, Award entered by Administrative Law Judge Robert H. Foerschler. The Board heard oral argument on October 3, 2006.

APPEARANCES

Steven C. Alberg, of Olathe, Kansas, appeared for the claimant. Kevin J. Kruse, of Overland Park, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. The Board also considered the post-accident wage information concerning claimant's wages and benefits from Deffenbaugh Industries (Deffenbaugh) as per the parties' stipulation contained in the May 12, 2006, letter by Steven C. Alberg to Kevin J. Kruse which was filed with the Division on May 15, 2006.

ISSUES

The Administrative Law Judge (ALJ) found that claimant had a 50 percent work disability as a result of his work-related accident while employed with respondent. The ALJ also left open claimant's right to apply for future medical treatment and unauthorized

medical expenses and found that unpaid medical expenses and mileage determined to be due under Kansas law should be paid by respondent.

Neither respondent and its insurance carrier (respondent) nor claimant submitted an appeal brief in this case but relied upon the arguments made in their respective submission letters to the ALJ.

Respondent requests review of all findings and orders of the ALJ in the Award. Respondent contends that claimant purposely derailed an accommodated job proposed by respondent. Respondent also contends that claimant has the capacity to earn more than 90 percent of his pre-injury wages. Accordingly, respondent argues that claimant is not entitled to a work disability and is limited to his functional disability. Respondent requests that the Board modify the Award to find that claimant only be awarded a permanent partial disability of 15 percent to the body as a whole for his cervical injury. If the Board finds that claimant is entitled to a work disability, respondent argues that the highest possible work disability award claimant would be entitled to is 41 percent, based upon a 46 percent wage loss and a 36 percent task loss.

Respondent agrees to provide payment of up to $500 for unauthorized medical treatment and that future medical should be upon proper application to the Director. Consequently, there is no issue on appeal of those questions. Respondent states that claimant has not submitted any medical mileage expenses but has not stated whether it is arguing that claimant would not be entitled to reimbursement for those expenses if submitted.

Claimant argues that he is entitled to payment of outstanding medical bills, continuing medical care provided by Drs. Chris Bagby and Robert Beatty, and medical mileage. Claimant requests that the Board find he has a 20 percent functional disability and a work disability of 54 percent, based upon a 56 percent wage loss and a 52 percent task loss.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant worked for respondent building traffic signal intersections. He earned a base wage of $31.50 per hour plus overtime and fringe benefits. The parties stipulated to a gross average weekly wage of $1,453.34, including overtime and benefits. On March 24, 2004, claimant was pouring a concrete pier that was three feet around and eight feet deep. He was holding ankle bolts and conduits in place as concrete was being poured. The concrete truck driver raised the chute in the air, and the wet cement hit him in the chest and knocked him backwards onto the ground. As he fell, he tried to prevent himself from

going into the street by throwing back his arms to try to catch himself. He suffered pain in the base of his neck into his upper back, shoulders, and arms.

Claimant reported the incident to respondent and to the concrete company. When claimant asked his boss about treatment for his injuries, his boss asked him to "ride it out"[1] and see if it got better. When he moved on to another job, the pain got worse. He again requested medical treatment from respondent and was asked to turn it into his private health insurance so respondent's insurance rates would not go up. Claimant went to see his personal physician, after which he returned to respondent and demanded that his claim be submitted to respondent's workers compensation insurance carrier.

When claimant went to see his personal physician, he was first seen by a nurse practitioner, who thought the injury was primarily an overuse injury to his shoulders rather than a cervical injury. He was referred to an orthopedic surgeon, Dr. Chris Bagby, who ordered an MRI and EMG and sent claimant to physical therapy. The therapist recognized claimant's cervical problems and went with him to Dr. Bagby. Claimant testified that then, finally, the doctors found the herniation in his neck.

Claimant continued to worsen and was sent to Dr. Robert Beatty, a neurosurgeon. Dr. Beatty first gave claimant some injections, which did not provide claimant any relief, and then performed surgery on his neck on February 24, 2005. Claimant was released by Dr. Beatty on April 6, 2005, with restrictions of no lifting. Dr. Beatty recommended that claimant only work in a supervisory role but indicated that he could drive a truck.

Claimant returned to respondent with these restrictions to see if he could go back to work. Claimant said that respondent called its insurance carrier, who called Dr. Beatty's office. The next day, claimant returned to respondent and was told that Dr. Beatty had indicated that he could lift up to 30 pounds as tolerated. After still more confusion about restrictions, claimant went to Dr. Beatty's office and picked up a note with restrictions showing that he could not ride on equipment that would cause a jerking motion to his neck and could only lift up to 30 pounds.

Jim Leonard, claimant's boss, made a list of tasks he thought claimant should be able to perform. Mr. Leonard and claimant went over the list, and claimant marked each item as to whether he believed he would be able to perform that task. After claimant did this, Mr. Leonard told claimant he could not perform enough of the tasks and that respondent did not have a job for him. A couple of months later, claimant contacted respondent and said he had healed some more and that he could perform more of the tasks, including driving a truck and operating some equipment. Phil Reed, Mr. Leonard's partner, told claimant that if his only restriction was a 30-pound lifting restriction,

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[1] R.H. Trans. at 16.

respondent would hire him back. However, because of his restrictions, Mr. Reed told claimant that it would be best if he moved on and did not return to work for respondent.

On July 12, 2005, claimant began work as a driller at Deffenbaugh in its environmental department, earning $16 per hour. His job requires him to go to gas stations and drill down from 15 to 30 feet to ground water and collect samples. Claimant drives the truck to the site and operates the levers on the back of the truck. A coworker does the manual labor. Claimant handles the PVC pipe only if the hole is over 20 feet deep, which rarely occurs.

Claimant's new job requires him to do a lot of driving, but his employer allows him to stop and take breaks and also has installed a special seat made for people with bad backs in the truck claimant drives. Claimant has a 3-year-old child that weighs 32 pounds. He at times lifts up his child, but this is the heaviest weight he has lifted since his surgery. Claimant testified that he is no longer taking any prescription medication but does take 800 mg. Ibuprofen three times a day.

Travis Gill is employed by respondent and often worked with claimant. He was with claimant on the date of his accident. Mr. Gill's description of the accident was consistent with that of claimant, except he said that claimant caught himself with his arms before falling on the ground. He guessed that claimant was hit with 100 to 150 pounds of concrete. He continued to work with claimant after the accident until claimant left respondent's employment. He testified that claimant complained about pain in his arms, shoulders and neck from the time of the accident until he was terminated. Claimant's condition got worse as the months went on, and he complained more and more every day.

Dr. Chris Fevurly is board certified in internal medicine and in preventative and occupational medicine. On July 22, 2005, he examined claimant at the request of respondent's attorney. He obtained a history from claimant which described his injury and his treatment from Drs. Bagby and Beatty. In examining claimant, Dr. Fevurly found claimant's shoulder and scapular heights were symmetric. Claimant had no atrophy. He ambulated normally with no antalgia, climbed on the examining table with no difficulty, and rose from the sitting position to a standing position with no problem. Dr. Fevurly found tenderness over claimant's lower cervical spine area, the paraspinals, and the upper back shoulder girdle musculature but no focal or localized trigger or tender points. Claimant had diminished range of motion in his shoulders, but there was no evidence of instability or crepitation. Spurling's test showed no current evidence for radicular symptoms, but claimant had a mild diminishment in sensation in the right C5 dermatome and a mild diminishment to pinprick in the right second through fifth fingers. According to Dr. Fevurly, claimant has regional pain, not myofascial pain, and his neurological deficits are mild and not severe.

Dr. Fevurly opined that claimant's accident injured and/or aggravated preexisting degenerative changes in his cervical spine leading to symptomatic cord impingement at

the cervical level, probably C5-6. He also believed there was probably some nerve root injury. Dr. Fevurly did not believe that claimant's shoulder pain was related to his injury but was degenerative arthritis.

Using the AMA *Guides*,[2] Dr. Fevurly opined that claimant had a Category III cervical thoracic diagnosis related estimates (DRE) impairment, giving him a 15 percent permanent partial impairment to the body as a whole.

Dr. Fevurly provided claimant restrictions, which include occasional lifting of 45 pounds to chest level and frequent lifting to 30 pounds to chest level. Claimant should avoid prolonged operation of heavy equipment that causes repetitive jerking of his head or vibration in the neck area. He should avoid prolonged or nonstop overhead work. Dr. Fevurly did not expect that claimant would have any future medical interventions for his work-related injuries to his cervical spine.

Dr. Fevurly reviewed the task list prepared by Mr. Cordray, and of the 22 items on that list, he opined that claimant would be unable to perform 8 tasks, which computes to a 36 percent task loss.

Dr. Peter Bieri, who is board certified in impairment and disability determinations, examined claimant at the request of claimant's attorney on February 13, 2006. Dr. Bieri took a history from claimant and reviewed past medical records. Upon examination of the cervical spine, Dr. Bieri found slight to moderate tenderness to diffuse palpation radiating into both shoulders. Range of motion was reduced in all directions, with an increase in complaints of pain with flexion and extension, along with brief, palpable muscle spasm and guarding. Examination of the shoulders showed no tissue atrophy. There was slight to moderate tenderness to palpation of both AC joints with active crepitance on range of motion. Active range of motion of the shoulders was slightly decreased secondary to pain but within normal limits.

Dr. Bieri diagnosed claimant with bilateral impingement syndrome and a herniated disc at C5-6. He opined that claimant had reached maximum medical improvement. Based on the AMA *Guides*, Dr. Bieri found that claimant had a 15 percent whole person impairment for DRE cervicothoracic Category III. He also found that claimant had a 5 percent upper extremity impairment bilaterally for residuals of pain and crepitance secondary to impingement syndrome, which translates to a 3 percent whole-person impairment bilaterally. Dr. Bieri combined the ratings to find that claimant had a 20 percent permanent partial disability to the body as a whole.

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[2] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

Dr. Bieri recommended that claimant limit occasional lifting to 35 pounds, frequent lifting not to exceed 20 pounds, and constant lifting not to exceed 10 pounds. Shoulder-level and overhead use should be performed no more than occasionally to frequently. He also recommended that claimant avoid operation of heavy equipment that causes persistent vibration or captive positioning involving the neck.

Dr. Bieri reviewed the task list prepared by Richard Santner and opined that of the 23 tasks itemized on the list, claimant was unable to perform 12, for a task loss of 52 percent.

At the request of claimant's attorney, Dick Santner met with claimant on September 22, 2005, in order to prepare a vocational assessment. Claimant indicated that he had gone to high school through the tenth grade. He did not have a diploma or a GED but had completed a certification as a signal technician in 1995 and 2002, had a certification for transporting of hazardous chemicals, and had a commercial drivers license. Mr. Santner prepared a list of 23 tasks performed by claimant in the 15-year period before his injury.

Mr. Santner did not have a wage statement from respondent on which to base a wage loss but stated claimant's loss would be about 50 percent, without taking into consideration his fringe benefit package from respondent. Mr. Santner did not know anything about claimant's job search after leaving respondent's employment before starting work at Deffenbaugh.

Terry Cordray met with claimant at the request of respondent on January 4, 2006, and prepared a list containing 22 tasks performed by claimant during the 15 years before his injury.

Claimant did not have a high school diploma or a GED. He had received vocational training as a traffic signal electrician. He also has a Class A commercial driver's license. He also received the Haz Whopper training for his current job on how to operate a drill rig and regarding different chemicals and petroleum products involved in ground seepage. Mr. Cordray was of the opinion that claimant could obtain a GED with no problem, which would increase his employment opportunities and wage potential.

Mr. Cordray testified that as a truck driver, claimant could earn up to $17.50 per hour. If claimant had stayed in the field of street lights and signals as a supervisor, he could earn $26 per hour.

Permanent partial disability under K.S.A. 44-510e(a) is defined as the average of the claimant's work task loss and wage loss. But, it must first be determined that a worker has made a good faith effort to find appropriate employment before the difference in pre- and post-injury wages based on the actual wages can be used. The good faith of an employee's efforts to find or retain appropriate employment is determined on a case-by-

case basis.[3] An employee is not required to seek post-injury accommodated employment with the employer in every case.[4] An employee may be entitled to a work disability after seeking other employment when the injury prevents him or her from continuing to perform his or her job duties for the employer.[5]

The Board finds that because of his restrictions, claimant would have been unable to continue to perform his job with respondent. The Board further finds that claimant made a good faith effort to work out an accommodated job with respondent post injury but they were unsuccessful. Thereafter, claimant made a good faith effort to become employed and, therefore, the Board will use his actual post-injury wage to compute his work disability.

The Board finds claimant's post-injury average weekly wage to be $771.22, which computes to 47 percent wage loss. In computing this figure, the Board has used the wage statement from Deffenbaugh that is marked as Respondent's Exhibit A and attached to the regular hearing, together with the letter from claimant's current employer concerning the cost of health insurance and the wage statement attached to respondent's brief, to which the admission of same the parties stipulated.

The Board also finds that claimant has a 44 percent task loss, which is an average of Dr. Fevurly's task loss opinion of 36 percent and Dr. Bieri's task loss opinion of 52 percent. Accordingly, the Board finds that claimant has a 45.5 percent work disability.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Robert H. Foerschler dated June 30, 2006, is modified to find that claimant has a 45.5 percent work disability.

Claimant is entitled to 25.09 weeks of temporary total disability compensation at the rate of $440 per week or $11,039.60 followed by 184.23 weeks of permanent partial disability compensation at the rate of $440 per week or $81,061.20 for a 45.5 percent work disability, making a total award of $92,100.80.

As of October 12, 2006, there would be due and owing to the claimant 25.09 weeks of temporary total disability compensation at the rate of $440 per week in the sum of $11,039.60 plus 108.05 weeks of permanent partial disability compensation at the rate of $440 per week in the sum of $47,542 for a total due and owing of $58,581.60, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining

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[3] *Parsons v. Seaboard Farms, Inc.*, 27 Kan. App. 2d 843, 9 P.3d 591 (2000).

[4] *Helmstetter v. Midwest Grain Products, Inc.*, 29 Kan. App. 2d 278, 28 P.3d 398 (2001).

[5] *Oliver v. Boeing Co.*, 26 Kan. App. 2d 74, 977 P. 2d 288, *rev. denied* 267 Kan. 889 (1999).

balance in the amount of $33,519.20 shall be paid at the rate of $440 per week for 76.18 weeks or until further order of the Director.

The Board notes that although the record contains the fee agreement between claimant and his attorney, the ALJ did not award claimant's counsel a fee for his services. K.S.A. 44-536(b) mandates that attorney fees for services rendered to claimant be reasonable as determined by the Director. Should claimant's counsel desire a fee for the services he provided claimant in this matter, then a request for the same should be presented to the ALJ.

The Board adopts all other findings, conclusions and orders of the ALJ to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this _____ day of October, 2006.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Steven C. Alberg, Attorney for Claimant
Kevin J. Kruse, Attorney for Respondent and its Insurance Carrier
Robert H. Foerschler, Administrative Law Judge